
By: **Delegates Shank, Amedori, Donoghue, Dwyer, Kelly, Lee, McComas,
McMillan, O'Donnell, Simmons, Sophocleus, and Zirkin**

Introduced and read first time: February 7, 2003

Assigned to: Judiciary

Committee Report: Favorable with amendments

House action: Adopted

Read second time: March 18, 2003

CHAPTER _____

1 AN ACT concerning

2 **Crimes - Internet Child Pornography - Removal**

3 FOR the purpose of requiring an investigative or law enforcement officer who receives
4 information that an item of alleged child pornography resides on a server or
5 other storage device controlled or owned by an interactive computer service
6 provider to contact the provider and request the provider's voluntary compliance
7 in removing the item within a certain period of time; requiring the officer to
8 apply for a court order if the provider does not voluntarily remove the item;
9 specifying certain information to be included in the application for a court order;
10 establishing the provider's right to a hearing on the application; requiring a
11 Internet service provider who is served with a court order that a certain item of
12 child pornography residing on ~~or accessible on~~ its service to persons in the State
13 shall be removed ~~or access to it disabled~~ to comply with the order within a
14 certain period; specifying the content of the court order; establishing a procedure
15 for issuing and serving the court order; authorizing a provider to petition the
16 court for relief for cause from the order on certain grounds; requiring a provider
17 who has notice that an item of child pornography resides on a server or other
18 storage device controlled or owned by the provider and located in the State or
19 pertains to a user residing in the State to report the item's location to the State
20 Police; providing a certain exception to the reporting requirement; providing a
21 criminal penalty for willful failure to provide certain information to the State
22 Police; providing a criminal penalty for failure to remove ~~or disable access to~~ a
23 certain item of child pornography from a certain server or other storage device;
24 providing that this Act does not impose a certain duty on the ~~Internet service~~
25 provider actively to monitor its ~~service~~ server or other storage device for a
26 certain item of child pornography; providing that this Act does not apply to the
27 transmission, routing, or temporary storage of certain images or information by

1 ~~a provider; establishing a procedure for applying for, issuing, and serving a court~~
2 ~~order; providing venue for the prosecution of an action against an a Internet~~
3 ~~service provider; defining certain terms; and generally relating to Internet~~
4 ~~service providers~~ interactive computer service providers and child pornography.

5 BY repealing and reenacting, without amendments,
6 Article - Courts and Judicial Proceedings
7 Section 10-402(c)(2)(i) and 10-406(b)
8 Annotated Code of Maryland
9 (2002 Replacement Volume)

10 BY repealing and reenacting, with amendments,
11 Article - Courts and Judicial Proceedings
12 Section 10-402(c)(2)(ii)1.F. and 10-406(a)(3)
13 Annotated Code of Maryland
14 (2002 Replacement Volume)

15 BY repealing and reenacting, without amendments,
16 Article - Criminal Law
17 Section 11-207 and 11-208
18 Annotated Code of Maryland
19 (2002 Volume)

20 BY adding to
21 Article - Criminal Law
22 Section 11-208.1
23 Annotated Code of Maryland
24 (2002 Volume)

25 SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF
26 MARYLAND, That the Laws of Maryland read as follows:

27 **Article - Courts and Judicial Proceedings**

28 10-402.

29 (c) (2) (i) This paragraph applies to an interception in which:

30 1. The investigative or law enforcement officer or other
31 person is a party to the communication; or

32 2. One of the parties to the communication has given prior
33 consent to the interception.

34 (ii) It is lawful under this subtitle for an investigative or law
35 enforcement officer acting in a criminal investigation or any other person acting at

1 the prior direction and under the supervision of an investigative or law enforcement
2 officer to intercept a wire, oral, or electronic communication in order to provide
3 evidence:

4 1. Of the commission of:

5 F. Child pornography under [§ 11-207 or § 11-208] § 11-207,
6 § 11-208, OR § 11-208.1 of the Criminal Law Article;

7 10-406.

8 (a) The Attorney General, State Prosecutor, or any State's Attorney may apply
9 to a judge of competent jurisdiction, and the judge, in accordance with the provisions
10 of § 10-408 of this subtitle, may grant an order authorizing the interception of wire,
11 oral, or electronic communications by investigative or law enforcement officers when
12 the interception may provide or has provided evidence of the commission of:

13 (3) Child pornography under [§ 11-207 or § 11-208] § 11-207, § 11-208,
14 OR § 11-208.1 of the Criminal Law Article;

15 (b) No application or order shall be required if the interception is lawful under
16 the provisions of § 10-402(c) of this subtitle.

17 **Article - Criminal Law**

18 11-207.

19 (a) A person may not:

20 (1) cause, induce, solicit, or knowingly allow a minor to engage as a
21 subject in the production of obscene matter or a visual representation or performance
22 that depicts a minor engaged as a subject in sadomasochistic abuse or sexual conduct;

23 (2) photograph or film a minor engaging in an obscene act,
24 sadomasochistic abuse, or sexual conduct;

25 (3) use a computer to depict or describe a minor engaging in an obscene
26 act, sadomasochistic abuse, or sexual conduct;

27 (4) knowingly promote, distribute, or possess with the intent to
28 distribute any matter, visual representation, or performance that depicts a minor
29 engaged as a subject in sadomasochistic abuse or sexual conduct; or

30 (5) use a computer to knowingly compile, enter, transmit, make, print,
31 publish, reproduce, cause, allow, buy, sell, receive, exchange, or disseminate any
32 notice, statement, advertisement, or minor's name, telephone number, place of
33 residence, physical characteristics, or other descriptive or identifying information for
34 the purpose of engaging in, facilitating, encouraging, offering, or soliciting unlawful
35 sadomasochistic abuse or sexual conduct of or with a minor.

1 (b) A person who violates this section is guilty of a felony and on conviction is
2 subject to:

3 (1) for a first violation, imprisonment not exceeding 10 years or a fine
4 not exceeding \$25,000 or both; and

5 (2) for each subsequent violation, imprisonment not exceeding 20 years
6 or a fine not exceeding \$50,000 or both.

7 (c) (1) (i) This paragraph applies only if the minor's identity is unknown
8 or the minor is outside the jurisdiction of the State.

9 (ii) In an action brought under this section, the State is not
10 required to identify or produce testimony from the minor who is depicted in the
11 obscene matter or in any visual representation or performance that depicts the minor
12 engaged as a subject in sadomasochistic abuse or sexual conduct.

13 (2) The trier of fact may determine whether an individual who is
14 depicted in an obscene matter, or any visual representation or performance as the
15 subject in sadomasochistic abuse or sexual conduct, was a minor by:

16 (i) observation of the matter depicting the individual;

17 (ii) oral testimony by a witness to the production of the matter,
18 representation, or performance;

19 (iii) expert medical testimony; or

20 (iv) any other method authorized by an applicable provision of law
21 or rule of evidence.

22 11-208.

23 (a) A person may not knowingly possess a film, videotape, photograph, or
24 other visual representation depicting an individual under the age of 16 years:

25 (1) engaged as a subject of sadomasochistic abuse;

26 (2) engaged in sexual conduct; or

27 (3) in a state of sexual excitement.

28 (b) A person who violates this section is guilty of a misdemeanor and on
29 conviction is subject to:

30 (1) for a first violation, imprisonment not exceeding 1 year or a fine not
31 exceeding \$2,500 or both; and

32 (2) for each subsequent violation, imprisonment not exceeding 2 years or
33 a fine not exceeding \$5,000 or both.

1 (c) Nothing in this section may be construed to prohibit a parent from
 2 possessing visual representations of the parent's own child in the nude unless the
 3 visual representations depict the child engaged:

4 (1) as a subject of sadomasochistic abuse; or

5 (2) in sexual conduct and in a state of sexual excitement.

6 11-208.1.

7 (A) (1) IN THIS SECTION THE FOLLOWING WORDS HAVE THE MEANINGS
 8 INDICATED.

9 (2) "CHILD PORNOGRAPHY" MEANS ANY ~~MATTER, ELECTRONIC IMAGE~~
 10 ~~OR VISUAL REPRESENTATION, OR PERFORMANCE DEPICTION~~ THAT IS UNLAWFUL
 11 UNDER § 11-207 OR § 11-208 OF THIS SUBTITLE.

12 (3) "CONTROLLED OR OWNED", WITH RESPECT TO A SERVER OR OTHER
 13 STORAGE DEVICE, MEANS TO BE ENTIRELY OWNED BY AN INTERACTIVE COMPUTER
 14 SERVICE PROVIDER OR TO BE SUBJECT TO EXCLUSIVE MANAGEMENT BY AN
 15 INTERACTIVE COMPUTER SERVICE PROVIDER BY AGREEMENT OR OTHERWISE.

16 ~~(3)~~ (4) "~~INTERNET INTERACTIVE COMPUTER SERVICE PROVIDER~~"
 17 ~~MEANS A PERSON WHO PROVIDES A SERVICE THAT ENABLES USERS TO ACCESS~~
 18 ~~CONTENT, INFORMATION, ELECTRONIC MAIL, OR OTHER SERVICES OFFERED OVER~~
 19 ~~THE INTERNET~~ AN ENTITY THAT PROVIDES A SERVICE THAT PROVIDES OR ENABLES
 20 COMPUTER ACCESS VIA THE INTERNET BY MULTIPLE USERS TO A COMPUTER
 21 SERVER OR SIMILAR DEVICE USED FOR THE STORAGE OF GRAPHICS, VIDEO, OR
 22 IMAGES.

23 (B) AN INVESTIGATIVE OR LAW ENFORCEMENT OFFICER WHO RECEIVES
 24 INFORMATION THAT AN ITEM OF ALLEGED CHILD PORNOGRAPHY RESIDES ON A
 25 SERVER OR OTHER STORAGE DEVICE CONTROLLED OR OWNED BY AN INTERACTIVE
 26 COMPUTER SERVICE PROVIDER SHALL:

27 (1) CONTACT THE INTERACTIVE COMPUTER SERVICE PROVIDER THAT
 28 CONTROLS OR OWNS THE SERVER OR OTHER STORAGE DEVICE WHERE THE ITEM OF
 29 ALLEGED CHILD PORNOGRAPHY IS LOCATED;

30 (2) INFORM THE INTERACTIVE COMPUTER SERVICE PROVIDER OF THE
 31 PROVISIONS OF THIS SECTION; AND

32 (3) REQUEST THAT THE INTERACTIVE COMPUTER SERVICE PROVIDER
 33 VOLUNTARILY COMPLY WITH THIS SECTION AND REMOVE THE ITEM OF ALLEGED
 34 CHILD PORNOGRAPHY FROM ITS SERVER OR OTHER STORAGE DEVICE WITHIN 5
 35 DAYS.

36 ~~(B)~~ (C) (1) AN IF THE INTERACTIVE COMPUTER SERVICE PROVIDER DOES
 37 NOT VOLUNTARILY REMOVE THE ITEM OF ALLEGED CHILD PORNOGRAPHY WITHIN
 38 THE TIME PERIOD ESTABLISHED IN SUBSECTION (B) OF THIS SECTION, THE

1 INVESTIGATIVE OR LAW ENFORCEMENT OFFICER SHALL APPLY FOR A COURT ORDER
2 OF AUTHORIZATION TO REMOVE ~~OR DISABLE ACCESS TO AN~~ THE ITEM OF ALLEGED
3 CHILD PORNOGRAPHY ~~UNDER THIS SECTION~~ IN ACCORDANCE WITH TITLE 10,
4 SUBTITLE 4 OF THE COURTS ARTICLE.

5 (2) THE APPLICATION FOR A COURT ORDER SHALL:

6 (I) IDENTIFY THE ITEM OF ALLEGED CHILD PORNOGRAPHY
7 DISCOVERED ON THE ~~INTERNET~~ SERVER OR OTHER STORAGE DEVICE CONTROLLED
8 OR OWNED BY AN INTERACTIVE COMPUTER SERVICE ~~PROVIDER'S SERVER~~
9 PROVIDER;

10 (II) PROVIDE ITS LOCATION ON THE SERVER OR OTHER STORAGE
11 DEVICE IN THE FORM OF AN INTERNET PROTOCOL (IP) ADDRESS OR UNIFORM
12 RESOURCE LOCATOR (URL);

13 (III) STATE THE GROUNDS FOR THE ISSUANCE OF THE ORDER; AND

14 (IV) VERIFY THAT THE ITEM OF ALLEGED CHILD PORNOGRAPHY
15 RESIDES ON THE SERVER OR OTHER STORAGE DEVICE CONTROLLED OR OWNED BY
16 THE INTERACTIVE COMPUTER SERVICE PROVIDER;

17 (V) DESCRIBE THE STEPS TAKEN TO OBTAIN VOLUNTARY
18 COMPLIANCE OF THE INTERACTIVE COMPUTER SERVICE PROVIDER WITH THIS
19 SECTION;

20 (VI) INFORM THE INTERACTIVE COMPUTER SERVICE PROVIDER OF
21 ITS RIGHT TO REQUEST A HEARING ON THE APPLICATION; AND

22 (VII) STATE THE NAME AND TITLE OF THE AFFIANT.

23 (3) THE INVESTIGATIVE OR LAW ENFORCEMENT OFFICER SHALL SERVE
24 THE APPLICATION ON THE INTERACTIVE COMPUTER SERVICE PROVIDER.

25 (4) THE INTERACTIVE COMPUTER SERVICE PROVIDER HAS THE RIGHT
26 TO REQUEST A HEARING BEFORE THE COURT IMPOSES ANY PENALTY UNDER THIS
27 SECTION.

28 ~~(C)~~ (D) THE COURT SHALL REVIEW THE AFFIDAVIT APPLICATION AND
29 TESTIMONY, IF OFFERED, AND, UPON A FINDING OF PROBABLE CAUSE, ISSUE AN
30 ORDER THAT:

31 (1) AN ITEM OF CHILD PORNOGRAPHY RESIDES ON A SERVER OR OTHER
32 STORAGE DEVICE CONTROLLED OR OWNED BY THE ~~INTERNET~~ INTERACTIVE
33 COMPUTER SERVICE ~~PROVIDER'S SERVICE~~ PROVIDER OR IS ACCESSIBLE THROUGH
34 THE ~~INTERNET SERVICE PROVIDER'S SERVICE~~ TO PERSONS LOCATED IN THE STATE;

35 (2) THERE IS PROBABLE CAUSE TO BELIEVE THAT THE ITEM VIOLATES §
36 11-207 OR § 11-208 OF THIS SUBTITLE;

1 (3) ~~THE INTERNET~~ INTERACTIVE COMPUTER SERVICE PROVIDER SHALL
2 REMOVE ~~OR DISABLE ACCESS TO THE ITEM ON ITS SERVICE~~ THE ITEM RESIDING ON
3 A SERVER OR OTHER STORAGE DEVICE CONTROLLED OR OWNED BY THE
4 INTERACTIVE COMPUTER SERVICE PROVIDER WITHIN 5 BUSINESS DAYS FROM
5 AFTER RECEIVING THE ORDER, IF PRACTICABLE; AND

6 (4) FAILURE OF THE ~~INTERNET~~ INTERACTIVE COMPUTER SERVICE
7 PROVIDER TO COMPLY WITH THE COURT'S ORDER IS A VIOLATION OF THIS SECTION;

8 (5) THE REMOVAL OF THE ITEM ON THE SERVER OR OTHER STORAGE
9 DEVICE CONTROLLED OR OWNED BY THE INTERACTIVE COMPUTER SERVICE
10 PROVIDER MAY NOT UNREASONABLY INTERFERE WITH A REQUEST BY A LAW
11 ENFORCEMENT AGENCY TO PRESERVE RECORDS OR OTHER EVIDENCE;

12 (6) THE PROCESS OF REMOVAL SHALL BE CONDUCTED IN A MANNER
13 THAT PREVENTS THE REMOVAL OF IMAGES, INFORMATION, OR DATA NOT
14 OTHERWISE SUBJECT TO REMOVAL UNDER THIS SECTION; AND

15 (7) PROVIDES THE INTERACTIVE COMPUTER SERVICE PROVIDER
16 NOTICE AND OPPORTUNITY FOR A HEARING BEFORE THE COURT IMPOSES ANY
17 PENALTY UNDER THIS SECTION.

18 ~~(D)~~ (E) (1) THE OFFICE OF THE STATE'S ATTORNEY SHALL SERVE THE
19 COURT'S ORDER ON THE ~~INTERNET~~ INTERACTIVE COMPUTER SERVICE PROVIDER.

20 (2) THE ORDER SHALL BE ACCOMPANIED BY:

21 (I) THE APPLICATION MADE UNDER SUBSECTION ~~(B)~~ (C) OF THIS
22 SECTION;

23 (II) NOTIFICATION REQUIRING THE ~~INTERNET~~ INTERACTIVE
24 COMPUTER SERVICE PROVIDER TO REMOVE ~~OR DISABLE ACCESS TO THE ITEM~~
25 RESIDING ON A SERVER OR OTHER STORAGE DEVICE CONTROLLED OR OWNED BY
26 THE INTERACTIVE COMPUTER SERVICE PROVIDER WITHIN 5 BUSINESS DAYS AFTER
27 RECEIVING THE ORDER;

28 (III) NOTIFICATION OF THE CRIMINAL PENALTIES FOR FAILURE TO
29 REMOVE ~~OR DISABLE ACCESS TO~~ THE ITEM OF CHILD PORNOGRAPHY;

30 (IV) NOTIFICATION OF THE RIGHT TO APPEAL THE COURT'S ORDER;
31 AND

32 ~~(V)~~ (V) CONTACT INFORMATION FOR THE OFFICE OF THE STATE'S
33 ATTORNEY.

34 ~~(E)~~ (F) AN ~~INTERNET~~ INTERACTIVE COMPUTER SERVICE PROVIDER WHO IS
35 SERVED WITH A COURT ORDER UNDER SUBSECTION ~~(D)~~ (E) OF THIS SECTION SHALL
36 REMOVE ~~OR DISABLE ACCESS TO~~ THE ITEM OF CHILD PORNOGRAPHY THAT IS THE
37 SUBJECT OF THE ORDER WITHIN 5 BUSINESS DAYS AFTER RECEIVING THE COURT
38 ORDER, IF PRACTICABLE.

1 (G) (1) AN INTERACTIVE COMPUTER SERVICE PROVIDER MAY PETITION THE
2 COURT FOR RELIEF FOR CAUSE FROM AN ORDER ISSUED UNDER SUBSECTION (D) OF
3 THIS SECTION.

4 (2) THE PETITION MAY BE BASED ON CONSIDERATIONS OF:

5 (I) THE COST OR TECHNICAL FEASIBILITY OF COMPLIANCE WITH
6 THE ORDER; OR

7 (II) THE INABILITY OF THE INTERACTIVE COMPUTER SERVICE
8 PROVIDER TO COMPLY WITH THE ORDER WITHOUT ALSO REMOVING DATA, IMAGES,
9 OR INFORMATION THAT ARE NOT SUBJECT TO THIS SECTION.

10 (H) (1) (I) SUBJECT TO SUBPARAGRAPH (II) OF THIS PARAGRAPH, AN
11 INTERACTIVE COMPUTER SERVICE PROVIDER SHALL REPORT THE LOCATION OF AN
12 ITEM OF CHILD PORNOGRAPHY TO THE STATE POLICE IF THE ITEM OF CHILD
13 PORNOGRAPHY:

14 1. RESIDES ON A SERVER OR OTHER STORAGE DEVICE THAT
15 IS:

16 A. CONTROLLED OR OWNED BY THE INTERACTIVE
17 COMPUTER SERVICE PROVIDER; AND

18 B. LOCATED IN THE STATE; OR

19 2. IN THE REASONABLE JUDGMENT OF THE PROVIDER,
20 PERTAINS TO A SUBSCRIBER OR USER OF THE INTERACTIVE COMPUTER SERVICE
21 WHO RESIDES IN THE STATE.

22 (II) SUBPARAGRAPH (I) OF THIS PARAGRAPH DOES NOT APPLY TO
23 AN INTERACTIVE COMPUTER SERVICE PROVIDER IF:

24 1. FEDERAL LAW EXPRESSLY PROVIDES FOR OR PERMITS
25 THE REFERRAL OF A REPORT OF AN ITEM OF CHILD PORNOGRAPHY TO A STATE OR
26 LOCAL LAW ENFORCEMENT AGENCY; AND

27 2. THE INTERACTIVE COMPUTER SERVICE PROVIDER
28 COMPLIES WITH THE FEDERAL LAW.

29 (2) AN INTERACTIVE COMPUTER SERVICE PROVIDER WHO KNOWINGLY
30 AND WILLFULLY FAILS TO REPORT THE INFORMATION REQUIRED UNDER
31 PARAGRAPH (1) OF THIS SUBSECTION IS GUILTY OF A MISDEMEANOR AND ON
32 CONVICTION IS SUBJECT TO:

33 (I) FOR A FIRST VIOLATION, A FINE NOT EXCEEDING \$5,000;

34 (II) FOR A SECOND VIOLATION, A FINE NOT EXCEEDING \$20,000;

35 AND

1 (III) FOR EACH SUBSEQUENT VIOLATION, A FINE NOT EXCEEDING
2 \$30,000.

3 (~~F~~) (I) AN ~~INTERNET~~ INTERACTIVE COMPUTER SERVICE PROVIDER WHO
4 WILLFULLY VIOLATES SUBSECTION (~~E~~) (F) OF THIS SECTION IS GUILTY OF A
5 MISDEMEANOR AND ON CONVICTION IS SUBJECT TO:

6 (1) FOR A FIRST VIOLATION, A FINE NOT EXCEEDING \$5,000;

7 (2) FOR A SECOND VIOLATION, A FINE NOT EXCEEDING \$20,000; AND

8 (3) FOR EACH SUBSEQUENT VIOLATION, ~~IMPRISONMENT NOT~~
9 ~~EXCEEDING 7 YEARS OR~~ A FINE NOT EXCEEDING \$30,000 ~~OR BOTH.~~

10 (~~G~~) (J) AN ~~INTERNET~~ INTERACTIVE COMPUTER SERVICE PROVIDER WHO
11 WILLFULLY VIOLATES SUBSECTION (~~E~~) (F) OR (H) OF THIS SECTION MAY BE
12 PROSECUTED, INDICTED, TRIED, AND CONVICTED IN ANY COUNTY IN OR THROUGH
13 WHICH:

14 (1) THE ~~INTERNET~~ INTERACTIVE COMPUTER SERVICE PROVIDER
15 PROVIDES ACCESS TO THE INTERNET;

16 (2) ANY COMMUNICATION FROM THE ~~INTERNET~~ INTERACTIVE
17 COMPUTER SERVICE PROVIDER TRAVELED; OR

18 (3) THE COMMUNICATION FROM THE ~~INTERNET~~ INTERACTIVE
19 COMPUTER SERVICE PROVIDER ORIGINATED OR TERMINATED.

20 (~~H~~) (K) (1) THIS SECTION DOES NOT IMPOSE A DUTY ON AN ~~INTERNET~~
21 INTERACTIVE COMPUTER SERVICE PROVIDER ACTIVELY TO MONITOR ITS SERVICE
22 OR AFFIRMATIVELY TO SEEK EVIDENCE OF AN ITEM OF CHILD PORNOGRAPHY ON
23 ITS SERVICE.

24 (2) THIS SECTION DOES NOT APPLY TO THE INTERACTIVE COMPUTER
25 SERVICE PROVIDER'S TRANSMISSION OR ROUTING OF, OR INTERMEDIATE
26 TEMPORARY STORAGE OR CACHING OF, AN IMAGE, INFORMATION, OR DATA THAT
27 OTHERWISE IS SUBJECT TO THIS SECTION.

28 SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect
29 October 1, 2003.